Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
American Teleservices Association, Inc.	)	**CG Docket No. 02-278**
	)	
Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code	)))	

REPLY COMMENTS OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

By submitting this reply comment, the Attorney General of New Jersey expressly states that he is not waiving the sovereign immunity of the State of New Jersey, nor is he submitting himself or the State of New Jersey to the jurisdiction of the Federal Communications Commission (the "Commission"). Rather, the Attorney General of New Jersey expressly reasserts his objections to the jurisdiction of the Commission to resolve the matters presented by the instant petition set forth more fully in his Motion to Dismiss and initial Comments. However, having reviewed the comments submitted in response to the Commission's request, the Attorney General of New Jersey submits this response in the event the Commission determines it has jurisdiction to decide the petition.

THE TCPA DOES NOT PREEMPT STATE CONSUMER PROTECTION LAWS

The Supremacy Clause of the Constitution[1] grants Congress the power to preempt State law. There are a number of circumstances where preemption will be found to occur: when Congress expresses a clear intent to preempt State law; when there is actual conflict between federal and State law; where compliance with both federal and State law is physically impossible; where there is an implicit barrier to State regulation in the federal law; where Congress has legislated

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[1] U.S. Const. art. VI, cl. 2.

comprehensively, leaving no room in the field for States to supplement federal law; and where the State law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[2] These circumstances have been distilled to three: express preemption, where Congress explicitly defines the extent to which federal law preempts State law; field preemption, where Congress intends federal law to completely occupy the field, leaving no room for State regulation; and conflict preemption, where it is impossible to comply with both State and federal requirements, or where State law serves as an obstacle to accomplishing the full objectives of Congress.[3]

Courts will ordinarily apply a presumption against preemption. In the absence of a clear statement by Congress to the contrary, courts will presume Congress did not intend to preempt State law.[4] The presumption against preemption is particularly strong when discussing the preemptive effect of administrative regulations. The Supreme Court has stated that inferring preemption whenever an agency has dealt with a problem comprehensively is "virtually tantamount" to saying that the agency's regulations will be exclusive whenever an agency chooses to regulate in a particular field, and that such a result would be inconsistent with the federal-state balance in Supremacy Clause jurisprudence.[5]

Consumer protection laws are considered part of the States' police powers, allowing States to protect consumers against unconscionable commercial practices and protecting the well-being of

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2 *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 368-69 (1986)(citations omitted).

3 *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1107-08 (N.D. Cal. 2003) (citing *Industrial Truck Ass'n Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997)).

4 *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *see also Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) ("the purpose of Congress is the ultimate touchstone").

5 *Hillsborough County v. Automated Medical Labs.*, 471 U.S.707, 717 (1985).

their citizens.[6] The Supreme Court has recognized that States may legislate to protect consumers against unwanted intrusions into their homes, and that governments may legislate to protect consumers from unwanted speech entering their homes.[7] Accordingly, consumer protection laws have been found to be subject to a heightened presumption against preemption.[8]

As set forth more fully below, the TCPA and the Commission's regulations do not preempt State consumer protection laws, including the New Jersey Do Not Call Law and Regulations. The statute does not provide for either express or field preemption, and the principles of conflict preemption do not lead to the conclusion that New Jersey's law is preempted.

A. The TCPA Does Not Expressly Preempt State Law

The intent of Congress is generally the primary factor in determining whether State law is preempted. Notwithstanding citation by several commenters to letters from the Commission staff, Commissioners or statements of Senators at the time of the enactment of the TCPA, the language of the statute is the principal source for determining Congressional intent and, contrary to the contentions of many of the commenters, the TCPA does not contain any express statement of preemption. Indeed, as the court found in *Florida v. The Sports Authority Florida, Inc.*, the language of the TCPA "expressly disavows any intent to preempt" State statutes, such as the New Jersey Do Not Call Law, which prohibit telemarketers from making unsolicited telephone calls to people who have signed up on a do not call list.[9] The language of the savings clause, as interpreted by the

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6 *See Edenfield v. Fane,* 507 U.S. 761, 768-69 (1993); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

7 *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

8 *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989).

9 *State of Florida v. The Sports Authority Florida, Inc.*, No. 6:04-cv-115-Orl-JGG, slip op. at 5 (M.D. Fla. June 4, 2004); *see also Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995).

Florida court and others, does not support the position that Congress intended to preempt State Do Not Call laws. Section 227(e) of the TCPA, "Effect on State law," provides:

> **(1) State law not preempted**
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits --
> **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> **(B)** the use of automatic telephone dialing systems;
> **(C)** the use of artificial or prerecorded voice messages; or
> **(D)** the making of telephone solicitations.

The "or" in the clause "or which prohibits" signals that the option of a State imposing requirements which prohibit the making of telephone solicitations is distinct from the clause excepting from preemption more restrictive intrastate requirements imposed by States. This construction, accepted by the Florida court, acknowledges the States' long history in regulating telemarketing, and permits the States to continue to protect their consumers.

The Commission itself has acknowledged the States' history in regulating telemarketing, and that the TCPA outlines a role for the States in the regulatory process.[10] In recognizing the States' long history in enforcing telemarketing laws, the Commission noted that the long-arm statutes under which States have historically enforced those laws "may be protected under section 227(f)(6) which provides that 'nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.'"[11] The Commission has also recognized what it perceives as an "ambiguity" in the savings clause: "This provision [227(e)(1)]is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether

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[10] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) ("Commission Order"), ¶ 75.

[11] Commission Order, ¶ 85.

state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted."[12] Thus, it is plain that the language of the TCPA does not provide a clear statement of express preemption of State law governing interstate telemarketing, and, to the contrary, supports the position of New Jersey, and the other States, that the TCPA does not preempt New Jersey law insofar as it prohibits the making of telephone solicitations to those consumers on the do not call list.

B. Field Preemption is Neither Authorized Nor Warranted

Field preemption occurs when Congress has legislated so comprehensively that there is no room for States to supplement federal law.[13] Federal occupation of a field may only be found when there is clear evidence of Congressional intent, or where the nature of the regulated subject matter permits no conclusion other than that preemption is warranted.[14]

In the instant case, field preemption is neither intended by Congress nor warranted by the circumstances. First, the language of the TCPA does not support a finding that Congress intended the Commission to occupy the field. In numerous places in the statute, there is mention of State regulation of telephone solicitations and States administering or enforcing State law. For example, the statute provides that if the Commission chooses to establish a single national database of residential subscribers who object to receiving telephone solicitations, the regulations shall "be designed to enable States to use the database mechanism selected by the Commission <u>for purposes of administering or enforcing State law.</u>"[15] Similarly, "a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list , or listing system that does

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[12] Commission Order, ¶ 82.

[13] *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. at 368 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

[14] *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

[15] 47 U.S.C. § 227(c)(3)(J) (emphasis added).

not include the part of such single national database that relates to such State."[16] Thus, the language of the TCPA expressly recognizes States' continued ability to regulate telephone solicitations, and thereby precludes the application of field preemption.

Further confirmation that field preemption is not warranted is provided by the Do-Not-Call Implementation Act ("DNCIA").[17] The DNCIA requires the Commission to issue a final rule under the TCPA, and requires the Commission to "consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission,"[18] following promulgation of regulations relating to the do-not-call registry. The DNCIA also requires the Commission and the Federal Trade Commission to transmit an annual report which shall include, among other things, "an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States."[19] In enacting the TCPA and the subsequent DNCIA, Congress has expressly recognized that jurisdiction in the area of regulation of telemarketing and do not call operation and enforcement lies not only with the federal agencies, but also with the States.

Several commenters urge the Commission to look beyond the four corners of the statute and declare State law preempted based on the Commission's own jurisdiction. Citing *City of New York v. Federal Communications Commission,*[20] commenters suggest that the Commission may determine that its authority is exclusive and that it may preempt State attempts to regulate in this area. However, these commenters overlook the requirement that <u>proper circumstances</u> are required for

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16 47 U.S.C. § 227(e)(2).

17 15 U.S.C. § 6101; Pub. L. 108-10.

18 Do Not Call Implementation Act, Pub. L. No. 108-10, § 3.

19 *Id.* at § 4(b)(4).

20 486 U.S. 57 (1988).

such a preemption determination to be made. Specifically, the agency must be acting within the scope of its Congressionally delegated authority.[21] An agency cannot confer power upon itself, and it may not expand its power when Congress has acted to limit its jurisdiction.[22] With respect to regulation of telephone solicitations, Congress has provided for jurisdiction by multiple entities -- the Commission, the Federal Trade Commission, and the States. For the Commission to declare that State laws are preempted would in essence be the Commission conferring a far greater jurisdiction upon itself that Congress has granted. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."[23] The Attorney General of New Jersey respectfully suggests that the Commission cannot preempt State law in this manner.

C. There is No Actual Conflict Between State and Federal Law

Conflict preemption occurs when there is an actual conflict between State and federal law, and it is physically impossible to comply with both, or where the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24] A State law will not be preempted simply because it differs from federal law. If it is possible to comply with both State and federal law, there will be neither a conflict nor a frustrated purpose.[25]

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[21] *Id.* at 63-64 (quoting *Louisiana Public Service Comm'n v. F.C.C., supra,* 476 U.S. at 368-69).

[22] *Louisiana Public Service Comm'n v. F.C.C., supra,* 476 U.S. at 374..

[23] *Id.* at 374-75.

[24] *Louisiana Public Service Comm'n v. F.C.C., supra,* 476 U.S. at 368-69; *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Florida Lime & Avocado Growers v. Paul, supra,* 373 U.S. at 142-43.

[25] *Florida Lime & Avocado Growers, supra; Bravman v. Baxter Healthcare Corp.,* 842 F. Supp. 747, 753 (S.D.N.Y. 1994).

The New Jersey Do Not Call Law and Regulations do not frustrate the accomplishment of the objectives of Congress. The goal of both State and federal laws is the same: to protect consumers from unwanted telemarketing calls "in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[26] As set forth above, Congress has expressly recognized the States' continued ability to regulate in the area of telemarketing, thus further supporting a conclusion that preemption is not warranted.

Numerous commenters, as well as ATA's petition, have cited to several provisions of the New Jersey Do Not Call Law that they argue should be preempted because they are more restrictive than federal law. The cited provisions, even if more restrictive, are nonetheless consistent with the States' ability to prohibit telephone solicitations pursuant to section 227(e) of the TCPA. For example, New Jersey law prohibits telemarketers from making calls to customers on behalf of the seller's affiliates.[27] The New Jersey Law presents a bright-line rule that gives effect to the consumers' expectation concerning who will be permitted to call them once they have placed themselves on the Do Not Call registry, in the absence of express written permission to call.

Other commenters note that New Jersey does not provide an exception for telemarketers with "personal relationships" with consumers. Again, New Jersey has, as an appropriate exercise of jurisdiction pursuant to section 227(e), prohibited the making of telephone solicitations by this group.

Commenters have also argued that New Jersey's definitions of "existing customer" and "established customer" are confusing and in conflict with the Commission's "established business

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[26] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9) (Congressional findings).

[27] N.J.A.C. 13:45D-4.1(c)1. The Commission's rules also limit the ability of affiliated entities to call consumers on the do not call list, prohibiting the call unless the consumer would reasonably expect the affiliate to be included in the established business relationship with the seller given the nature and type of goods or services offered by the affiliate.

relationship" exception. The Attorney General of New Jersey disagrees. Like the federal rules, the New Jersey rules are intended to protect residents from unwanted unsolicited telemarketing sales calls, and to give effect to the consumers' reasonable expectations of the entities that will continue to be permitted to call them after the consumers have added themselves to the Do Not Call Registry. Although the defined terms are slightly different, it is possible to harmonize the federal and State schemes. As one commenter, a former executive of a division of a large publicly-traded teleservicing firm, asserted: "It is neither technically difficult nor costly for telemarketing firms to accommodate the requirements of the national list and additional state lists. In fact, a number of convenient commercial solutions are currently available and in use by telemarketers."

Many commenters complain that the Do Not Call Registry prohibits them from contacting consumers about various offers. These comments fail to acknowledge that sellers may still obtain consumers' express consent for telephone solicitation through direct mail, inserts in monthly statements, via the internet, or at the point of sale.[28] Moreover, sellers may request consent from consumers to be contacted about offers by affiliates, or for additional products or special promotions. If the consumer is unwilling to give consent, then State and federal law work to effectuate that consumer's expectation that he or she will not be called. On the contrary, if the consent is given, the seller has no concerns about violating either State or federal law in calling that consumer.

Commenters also cite to the disclosure provisions which require the telemarketer to disclose, within the first thirty seconds of a call: the name of the person making the call, the name of the telemarketing entity making the call; the name of the person or entity on whose behalf the call is being made; and the purpose of the call.[29] The New Jersey disclosure requirements are similar to

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[28] *See Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1243 (10th Cir. 2004) (noting that telemarketers may still contact consumers on the Do Not Call Registry through direct mail or advertising in other media).

[29] N.J.A.C. 13:45D-4.3(a).

those contained in the Commission's rules; the commenters' primary concern seems to be that New Jersey law requires that the disclosures must occur within the first thirty seconds of the call. Incorporating a time element which applies to the disclosure required by State and federal law does not amount to a conflict and it is certainly possible to comply with both State and federal law. Accordingly, there is no actual conflict.

CONCLUSION

The Attorney General of New Jersey respectfully requests, in the event the Commission determines that it has jurisdiction to decide this matter, that the Commission conclude that the New Jersey Do Not Call Law and Regulations are not preempted by federal law.

Respectfully submitted,

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